No. 11-17255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

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INTRODUCTION

The Proponents of Proposition 8, who failed in defending the constitutionality of their discriminatory measure in a 12-day *public* trial, are fiercely fighting to prevent the public from viewing the digital recording of that trial. That recording, however, is "unquestionably part of the record," having been used by Plaintiffs in their closing arguments without objection and relied upon by the district court in formulating its opinion. ER 5. And the recording contains no confidential or sensitive information. To the contrary, the recording consists entirely of testimony and argument given in *open court*. The 13-volume written trial transcript has long been publicly available, as have the names and professional and academic affiliations of the witnesses. Under these circumstances, Proponents' argument that the recording meets the stringent requirements for sealing and must be forever hidden from public view makes no sense. Chief Judge Ware's ruling "that no compelling reasons exist for continued sealing of the digital recording of the trial" (ER 1-2) is reviewed only for abuse of discretion (*Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)) and should be affirmed.

"What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Proponents have provided no justification—compelling or otherwise—for continued concealment of the trial recording, which truly and

accurately depicts the events that took place in the district court in full public view. The First Amendment and settled common law principles guarantee the public the right to watch the trial video in this case and to evaluate the evidence, arguments and outcome for itself. As the Supreme Court has held, "[o]penness . . . enhances both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984). This Court should affirm the district court's ruling to unseal the trial recording.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to review the district court's decision granting Plaintiffs-Appellees' motion to unseal the trial video after the entry of judgment pursuant to 28 U.S.C. § 1291. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

STATEMENT OF THE ISSUE

Did the district court abuse its discretion when it determined that no compelling reasons exist for the continued sealing of the digital recording of a public trial that "is unquestionably part of the record" in this case? ER 5.

STATEMENT OF THE CASE

This case-within-a-case arises from Plaintiffs' constitutional challenge to Proposition 8, a California ballot initiative that stripped gay and lesbian Californians of their fundamental right to marry the person of their choice. The trial court digitally recorded the 12-day public trial on the constitutionality of Proposition 8, relied on the trial video in preparing its findings of fact and conclusions of law, and allowed the parties to play portions of the video in open court during their closing arguments, which Plaintiffs did without objection from Proponents, who had intervened in this case to defend the constitutionality of Proposition 8. After issuing its opinion striking down Proposition 8 as unconstitutional, the district court directed the clerk to file the trial recording under seal as part of the record, again without objection from Proponents. Proponents appealed the trial court's ruling on the merits to this Court. *See* Case No. 10-16696.

Pending the resolution of that appeal, Proponents filed a motion in this Court seeking the return of all copies of the digital recording. ER 1303. Plaintiffs cross-moved for an order unsealing the recording. ER 1286. This Court transferred the motions to the district court, ER 1251, which denied Proponents' motion and granted Plaintiffs' motion. ER 18; ER 1. Proponents now appeal the district court's order unsealing the trial recording. On October 24, 2011, this Court stayed

the district court's order but expedited the appeal, instructing the parties to submit "simultaneous principal briefs" on the issue whether the district court acted within its discretion when it ordered the unsealing of the trial recording. ER 1153.

STATEMENT OF FACTS

Plaintiffs are gay and lesbian Californians who wish to marry. ER 113-14. As a direct result of Proposition 8, Plaintiffs were denied this right solely because their prospective spouses are of the same sex. *Id.* They filed the underlying suit to restore their right to marry the person of their choice. *Id.* at 84-85, 172.

In January 2010, the United States District Court for the Northern District of California conducted an historic, 12-day *public* trial on an issue of great legal importance and public interest: whether Proposition 8 violates the due process and equal protection guarantees afforded gay men and lesbians by the Fourteenth Amendment by stripping them of the fundamental right to marry. Before trial began, a coalition of media companies had requested the district court's permission to televise the trial. ER 225. After conducting a hearing on whether to broadcast the trial, the district court "requested the Chief Judge of the Ninth Circuit to approve inclusion of the trial in the pilot project" that allowed audio-video transmission of non-jury trial court proceedings. *Id*. Chief Judge Kozinski approved real-time streaming of the trial to "a number of federal courthouses

around the country," but the U.S. Supreme Court "stay[ed] the broadcast." *Hollingsworth v. Perry*, 130 S. Ct. 705, 706-07 (2010) (per curiam). Confining its review to the "narrow legal issue" presented by Proponents' stay application, and "without expressing any view on whether such trials should be broadcast," the Court held that "the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." *Id.* at 706, 709.

The district court subsequently informed the parties that although it could not broadcast the trial, it would digitally record the proceedings for use in chambers, explaining that the recording "would be quite helpful to the Court in preparing the findings of fact." ER 1139. The district court further explained that Local Rule 77-3 permits "recording for purposes of use in chambers" and informed the parties that this was "the purpose . . . for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising." *Id.* at 1139.

Shortly before closing arguments, the district court notified the parties that "[i]n the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." ER 207. The district court ordered the parties "to maintain as strictly confidential any copy of

the video pursuant to paragraph 7.3 of the protective order." *Id.* No party objected to the use of the digital recording in closing arguments, which were open to the public, and both Plaintiffs and Plaintiff-Intervenor City and County of San Francisco requested and received a copy of the recording. Plaintiffs' counsel played a number of excerpts of the trial recordings during closing arguments without objection.

On August 4, 2010, the district court ruled in favor of Plaintiffs, declared that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined its enforcement. ER 195. In its decision, the district court explained that the digital recording of the trial was "used by the court in preparing the findings of fact and conclusions of law," just as it had informed the parties it would be used. *Id.* at 6. The district court expressly directed the clerk "to file the trial recording under seal *as part of the record*." *Id.* (emphasis added). No party objected to the digital recording being made part of the record, and no party moved to strike the digital recording from the record.

On April 13, 2011, Proponents filed a motion in this Court seeking the return of all copies of the digital recording. Plaintiffs cross-moved for an order unsealing the recording. Recognizing that "the district court issued the protective

order and has the power to grant the parties all the relief they seek," this Court transferred the motions to the district court. ER 1251.

The district court denied Proponents' motion for return of the digital recording, and on September 19, 2011, granted Plaintiffs' motion to unseal. As the district court explained, "the digital recording is unquestionably part of the record" in this case. ER 5. Thus, the "common law right of access to records in civil proceedings" creates "'a strong presumption in favor of access'" to the recording. ER 5, 7 (quoting *Foltz*, 331 F.3d at 1135). The court emphasized that, "[f]oremost among the aspects of the federal judicial system that foster public confidence in the fairness and integrity of the process are public access to trials and public access to the record of judicial proceedings." "Consequently," the court continued, "once an item is placed in the record of judicial proceedings, there must be compelling reasons for keeping that item secret." ER 1.

The district court closely examined whether Proponents had "'articulate[d] compelling reasons supported by specific factual findings' that 'outweigh the general history of access and the public policies favoring disclosure.'" ER 7 (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)). Exercising its broad discretion, the district court found "that no compelling reasons exist for continued sealing of the digital recording of the trial,"

ER 1-2, rejecting the four justifications advanced by Proponents for maintaining the trial video under seal.

First, the court rejected Proponents' argument that the recording was created under false pretenses, holding "the record does not support [Proponents'] contention that Judge Walker limited the digital recording to chambers use only." ER 8. To the contrary, "Judge Walker, without objection, made copies of the digital recording available to the parties for use during closing arguments," all but ensuring the video would become part of the judicial record. ER 8. Second, the court dismissed as "misguided" Proponents' reliance on the "narrow" injunction issued by the Supreme Court in *Hollingsworth*, 130 S. Ct. 705, which "solely address[ed] procedural issues arising from the Northern District's amendment of its local rules." ER 9-10. Third, the district court held that Local Rule 77-3 does not govern Plaintiffs' motion to unseal the trial video because the rule speaks "only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses." ER 10. The court explained that "[n]othing in the language of Local Rule 77-3 governs whether digital recordings may be placed into the record. Nor does the Rule alter the common law right of access to court records if a recording of the trial is placed in the record of proceedings." ER 10. Lastly, the court rejected Proponents' public policy arguments, dismissing as "mere 'unsupported hypothesis or

conjecture'" their purported concern that unsealing the trial video "could have a chilling effect on expert witnesses' willingness to cooperate in any future proceeding." ER 11 (quoting *Hagestad*, 49 F.3d at 1434) (alteration and internal quotation marks omitted).

In the absence of any compelling reason to maintain the video under seal, the district court held that Proponents could no longer shield the recording from public view. "Transparency," the court explained, "'is pivotal to public perception of the judiciary's legitimacy and independence.'" ER 6 (quoting *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008)).

SUMMARY OF ARGUMENT

This Court should affirm the district court's order granting the motion to unseal the trial recording. Proponents have not offered even a minimally persuasive justification for continuing to deny the public its right under the common law and the First Amendment to view that important part of the record in this closely watched and exceedingly consequential litigation.

The trial recording is unquestionably part of the judicial record in this case. Proponents never appealed the trial court's decision to digitally record the trial, never objected to the court's decision to allow the parties to use the video in closing arguments, never objected to the court's decision to place the video in the rec-

ord, and never moved to strike the video from the record. Thus, the only question adjudicated below, and the only question this Court confronts, is whether the stringent requirements for continued sealing of that judicial record have been met.

There is no legitimate basis for continuing to suppress the video recording. Both the common law and the First Amendment require Proponents to provide compelling reasons to overcome the strong presumption that the judicial record should be accessible to the public. Proponents have failed to make that showing. They present only one justification for overcoming the strong presumption of public access: They contend their expert witnesses may be intimidated and harassed if the public sees their testimony. But in the nearly two years since the public trial took place, Proponents have never pointed to an iota of evidence to support such unlikely conjecture. The identities of Proponents' witnesses, where they live and work, and the transcripts of every word they said on the stand have been available on the Internet since they testified. Both witnesses are vocal public figures, appearing on televised news programs and in other public fora. If any of them suffered harassment or intimidation, Proponents doubtless would have submitted evidence of it. They have not.

Unable to provide a compelling justification for maintaining the trial recording under seal, Proponents argue that the Supreme Court's decision in *Hol-*

lingsworth, 130 S. Ct. 705, as well as Local Rule 77-3, prevent unsealing the record. Both arguments fail. *Hollingsworth* was a narrow opinion dealing only with the procedure attending the district court's amendment of its local rules. And Local Rule 77-3 is similarly narrow, dealing only with the *creation* of trial recordings for the purpose of broadcast, which did not occur here. Neither has anything to say about public access to an existing video that is part of the judicial record.

STANDARD OF REVIEW

A decision granting a right of access to judicial records will be reversed only for abuse of discretion. *Foltz*, 331 F.3d at 1135. A district court abuses its discretion when it premises its decision on a legal error or a clearly erroneous view of the relevant facts. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405 (1990).

ARGUMENT

I. THE COMMON LAW REQUIRES UNSEALING THE TRIAL VIDEO.

The common law grants the public "a general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *see also Hagestad*, 49 F.3d at 1434 (citing *Nixon*, 435 U.S. at 597) (recognizing a common law right of access to court records in civil proceedings). "Because the Constitution grants the judiciary 'neither force nor will, but merely judgment,'" courts are permitted to "impede scrutiny of the exercise of that judg-

ment only in the rarest of circumstances." *Aref*, 533 F.3d at 83 (quoting The Federalist No. 78 (Alexander Hamilton)). "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

Accordingly, there is "a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135; *see also Kamakana*, 447 F.3d at 1182 ("[T]he proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails."); *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) (noting the common law's "strong presumption in favor of access"). To overcome that "strong presumption," a party is required to articulate "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted); *see also Hagestad*, 49 F.3d at 1434 (holding that the presumption of public access "may be overcome only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture" (internal quotation marks omitted)).

Here, the district court found that Proponents failed to overcome the "strong presumption" in favor of public access to the trial video—a ruling that is entitled to substantial deference. *See Hagestad*, 49 F.3d at 1434 (holding that the decision whether to unseal court records is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case" (internal quotation marks omitted)). Far from abusing its discretion, the district court's ruling faithfully applied the common law's presumption of public access. This Court should affirm that decision and unseal the digital recording of the trial.

A. The Trial Video Is Indisputably Part Of The Judicial Record

The trial video at issue was "used by the court in preparing the findings of fact and conclusions of law," ER 65, and is "unquestionably part of the record." ER 5; *see also id.* ("It is undisputed that on August 4, 2010, Judge Walker ordered the Clerk to file the digital recording of the trial under seal 'as part of the record.'" (quoting ER 61)); ER 1278 (Proponents conceding that "the recordings are now part of the record of the case"). Having already conceded this outcome-determinative fact, Proponents instead contend that the video *should not* be part of the record, either because it was intended only for Judge Walker's in-chambers use or because it never should have been created in the first place. *See* ER 1278 [Prop.

Opp. at 5] ("[T]he recordings could lawfully have been created in the first place only on condition that they not be publicly disseminated outside the courthouse."). Proponents' arguments fail for multiple reasons.

As an initial matter, Proponents' arguments are beyond the scope of this appeal. In the proceedings below, the district court explained that "[t]he parties . . . limited their argument solely to whether the digital recording," as part of the court record, "should remain sealed." ER 5-6. Thus, this Court should limit its review to that question alone. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) ("As a general rule, we will not consider an issue raised for the first time on appeal.").

Relatedly, Proponents' arguments were long ago waived when Proponents failed to object to the creation of the video, failed to object to the dissemination of the video for the parties' use in closing arguments, failed to object to Judge Walker's inclusion of the video in the record of the case, and failed to move to strike the video from the record. *See* ER 1059-60 (Proponents conceding there was no "objection when the parties played it in open court" and "there was not a motion to strike"); ER 1060 ("THE COURT: So having not stricken it from the record, and actually arguing that it is part of the record – I deal with it as a record."); ER 1064 (Proponents conceding there was no objection when Judge Walker said he was

"going to record [the trial] for [his] use" and no objection when "he placed it in the record").

Moreover, Proponents' arguments are factually incorrect. After examining the transcripts in this case, the district court found "that the record does not support the contention that Judge Walker limited the digital recording to chambers use only." ER 8. Rather, Judge Walker explicitly informed the parties that the video would be used in such a manner as to practically ensure it would become part of the trial record: Judge Walker said he would use the video in drafting his opinion and allowed the parties to play segments of the recording in open court. *Id.*; *see also Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1181 (6th Cir. 1983) (A court record includes any "evidence and records the District Court . . . relie[s] upon in reaching [its] decisions."). Moreover, even if Judge Walker had assured Proponents that the video would remain confidential (which he did not), Proponents had no reasonable expectation that such an assurance would forever supersede the public's right to access the recording. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (noting it is "difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret"); *Diversified Grp., Inc. v. Daugerdas*, 217 F.R.D. 152, 160 (S.D.N.Y. 2003) ("[T]he parties' alleged reliance

on the [Protective] Order is insufficient to outweigh the strong presumption in favor of public access."); *see also Foltz*, 331 F.3d at 1133 (mere reliance on a blanket protective order when producing documents cannot overcome right of access); *McConnell v. FEC*, 251 F. Supp. 2d 919, 927, 940 (D.D.C. 2003) (disclosing documents "to the public" despite previous "assurances of confidentiality"); *see also* ER 221 ("Nothing in this Order abridges the right of any person to seek its modification by the Court in the future."). A district court's decision to seal a record does not mean a party or the public is forever foreclosed from moving to have it unsealed, and a district court hearing such a motion must decide whether continued sealing is warranted. Proponents' "once sealed, forever sealed" argument simply is not the law.

Finally, Proponents' arguments are immaterial. In considering whether to unseal a judicial record, courts do not conduct a retrospective inquiry into how each item entered the record in the first place. In civil cases, items can be placed into evidence or made part of the public record even if they were unlawfully or unconstitutionally obtained. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in certain civil cases). The proper question is whether there is any *prospective* need for confidentiality that trumps the presumed right of public access. *See, e.g., EEOC v. Erection Co.*, 900 F.2d

168, 170 (9th Cir. 1990) (considering "whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets"). Any purported promise Judge Walker made to Proponents before creating the trial recording is therefore irrelevant to the issue before this Court; all that matters is that the video exists and is part of the record.

B. Proponents Cannot Overcome The Strong Presumption Favoring Public Access To Judicial Records

In arguing below that the video should remain under seal, Proponents advanced only one substantive reason for maintaining confidentiality: They contended that "public dissemination of the [trial video] could have a chilling effect . . . on expert witnesses' willingness to cooperate in any future proceeding." ER 308. The district court rejected that argument as "'unsupported hypothesis or conjecture,' which may not be used by the Court as a basis for overcoming the strong presumption in favor of access to court records." ER 11 (quoting *Hagestad*, 49 F.3d at 1434); *see also* ER 92-93 (Proponents' assertion that their witnesses "were extremely concerned about their personal safety" was not credible).

The district court's conclusion is plainly correct. Indeed, this Court has recognized that mere argument about, or assertions of, potential harm—even grave, physical harm in a criminal case—are insufficient to overcome the strong presumption in favor of public access to judicial records. *See Oregonian Publ'g Co. v. U.S.*

Dist. Court, 920 F.2d 1462, 1467 (9th Cir. 1990) (vacating an order denying public access to a plea agreement because the defendant's counsel did "not present facts demonstrating any danger to [the defendant] or his family"). Proponents in this case likewise have never offered any "evidentiary support" whatsoever to support their alleged concern about witness intimidation. *Id.* The public has long known Proponents' two witnesses who testified in this trial—their identities, where they live and work, and the transcripts of every word they said on the stand have been available on the Internet since they testified. In fact, these two paid expert witnesses had already written and published their views by the time they testified . And one of the witnesses—David Blankenhorn—recently acknowledged that while he personally does not believe in televising trials, his reasons for holding that belief "have nothing to do with the physical safety of expert witnesses" and he "never felt physically threatened." *See* David Blankenhorn, Comment to *8*, Family Scholars.org (Sept. 14, 2011, 12:49 PM), http://familyscholars.org/2011/09/10/8/.

Thus, at most, Proponents' argument amounts to a claim that allowing the public to see and hear the testimony, as opposed to just reading it or reading about it in the press, will somehow result in intimidation and harassment that might deter these or other expert witnesses from coming forward to testify for compensation in the future. But this argument simply makes no sense. In fact, video deposition tes-

timony of one of the Proponents and two of their later-withdrawn expert witnesses has been available on the Internet, including on the district court's website, for more than a year and a half. *See, e.g.*, Perry v. Schwarzenegger Evidence Index, https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html (last updated Aug. 4, 2010). Proponents' expert witnesses have appeared in televised news programs and public fora, in some cases for the express purpose of espousing their controversial theories on same-sex marriage. *See, e.g.*, C-SPAN Gay Marriage Debate, http://fora.tv/2007/03/14/Gay_Marriage_Debate#fullprogram (featuring David Blankenhorn) (March 14, 2007); In Blue California, Do Campaigns Matter?, http://www.youtube.com/watch?v=rUV4z3yxlyw (featuring Ken Miller) (Feb. 8, 2011). And the oral arguments of Proponents' attorneys before this Court and the California Supreme Court were broadcast live and remain available online. *See, e.g.*, Perry v. Schwarzenegger Oral Arguments, http://www.c-spanvideo.org/program/296911-1 (Dec. 6, 2010) (Ninth Circuit oral argument); Oral Arguments in Prop. 8 Cases on September 6, http://www.courts.ca.gov/15247.htm (Sept. 2, 2011) (linking to California Supreme Court oral argument). If any of them suffered harassment or intimidation, Proponents doubtless would have submitted evidence of it. Neither evidence nor logic supports Proponents' speculative claims of threatened harm, which are noth-

ing more than a guise for Proponents' true concern that the public will see for itself the utter lack of evidence or persuasive argument offered in defense of Proposition 8's institutionalized discrimination against gay men and lesbians.

In fact, as recently as last week, the Eastern District of California rejected a similar argument by some of the same Proponents that "disclosure of the identities of their contributors must be barred because . . . such disclosure will lead to threats, harassment or reprisals." *ProtectMarriage.com v. Bowen*, No. 2:09-cv-00058-MCE-DAD, slip op. at 18 (E.D. Cal. Nov. 4, 2011). As that court explained, "Plaintiffs' contributors' names were actually disclosed years ago and yet Plaintiffs have produced almost no evidence of any ramifications suffered in the almost three years post-disclosure. . . . Accordingly, from a practical perspective, it makes no sense to buy in to the argument that disclosure *may* result in repercussions when there is simply no real evidence in the record that such repercussions actually *did* occur in the past three years." *Id.*, slip op. at 37-38 (citing *Doe v. Reed*, No. C09-5456BHS, 2011 WL 4943952, at *10 n.3 (W.D. Wash. Oct. 17, 2011)). Proponents' evidence of purported harassment in this case is equally flimsy.

Nor can Proponents assert any interest in the confidentiality of the proceedings. This was a *public* trial in which Proponents' experts purposefully thrust themselves and their opinions into the public domain on highly visible and contro-

versial subjects. They were actively engaged in a voluntary effort to convince the judicial system of the correctness of their opinions and to influence the outcome of the trial on constitutional issues affecting hundreds of thousands of California citizens. Hundreds of people watched their testimony at the San Francisco Courthouse, both in the courtroom where the trial took place and in overflow courtrooms. Reporters and bloggers published detailed accounts of the testimony and wrote extensively about the witnesses who testified. The 13-volume trial transcript is part of the public record and widely available on the Internet. So, too, are reenactment videos of actors reading those transcripts widely available, including on YouTube.[1] There was even a play on Broadway in which portions of the trial were performed live, word for word. *See* Michael Schulman, *Do-Over*, The New Yorker (Oct. 3, 2011), *available at* http://www.newyorker.com/talk/2011/10/03/111003ta_talk_schulman. Thus, while releasing the trial video will allow members of the public to view the actual trial proceedings with their own eyes rather than forcing them to read a cold writ-

[1] *See, e.g.*, http://www.youtube.com/user/EqualityOnTrial#p/u/24/CwBsnklZpwM (re-enacting portion of direct examination of Kristin Perry by Theodore B. Olson); http://www.youtube.com/user/EqualityOnTrial#p/u/2/_N3zihQzXrw (re-enacting direct examination of Professor Nancy Cott by Theodore J. Boutrous Jr.); http://www.youtube.com/user/marriagetrial/#p/c/3/_-FWhMi5e-k (re-enacting Proponents' expert witness, David Blankenhorn, cross examination by David Boies).

ten record, it will reveal *no* confidential information and no information that is not already available from other, albeit less user-friendly, sources. It is far too late in the day for Proponents to assert a need for confidentiality over any aspect of the record in this case.

Lastly, Proponents argue that the digital recording is "not the type of judicial record to which the common-law right of access applies" because it is not "evidence or even argument" and because it is "wholly derivative of the evidence offered, and the arguments made, in open court." ER 1241. This argument is wrong in several respects. First, the common law right of access is not limited to evidence or argument at trial—it applies to all judicial records—and Proponents cite no authority for their contention that it is so limited. *See, e.g., Press-Enter. Co.*, 464 U.S. at 513 (transcript of *voir dire* proceedings); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (docket sheets); *see also United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source."). Second, items in a public record will often be "derivative" of one another—for example, a brief or proposed findings of fact summarizing the testimony at trial—yet Proponents cite no authority for the premise that they can pick and

choose which items the public may access and which it may not. Third, the fact that Proponents have fought for nearly two years to suppress the video of this historic trial belies any suggestion that the digital recording provides no added value beyond the record items currently available to the public.

II. THE FIRST AMENDMENT REQUIRES PUBLIC ACCESS TO THE TRIAL VIDEO.

In addition to the common law, the First Amendment also compels public access to judicial records like the trial video at issue. As the Supreme Court has recognized, access to judicial proceedings is necessary "to protect the free discussion of governmental affairs" essential to our democracy. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted). Public access to trials and trial records is so important that even a 48-hour delay in unsealing judicial records is considered "a *total restraint* on the public's first amendment right of access." *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (emphasis added). Consequently, "[u]nder the first amendment, the press and the public have a presumed right of access to court proceedings and documents." *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enter. Co.*, 464 U.S. at 510). This First Amendment right of access applies with equal force to court records in both civil and criminal trials. *See, e.g., Hartford Courant Co.*, 380 F.3d at 91 (detailing "[t]he circuits, in-

cluding ours, [that] have concurred in holding that [the First Amendment] right applies to civil as well as criminal proceedings"); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (determining that "the First Amendment embraces a right of access to [civil] trials") (internal quotation marks omitted).[2]

The First Amendment guarantee of free and open access to judicial proceedings not only promotes public debate about governmental affairs, but also fosters public confidence in the judicial system. Indeed, "it is difficult for [people] to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion); *see also Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) ("Openness of the proceedings will help to ensure [the] important decision is properly reached and enhance public confidence in the process and result."). As one court has explained, "[o]ur national experience instructs us that, except in rare circumstances openness preserves, indeed, is essential to, . . . public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital

[2] *See also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (holding that the "rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case"); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well."); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177 (holding that "the First Amendment and the common law . . . limit judicial discretion [to seal court documents]").

means to open justice . . . ." *ABC, Inc. v. Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004). The trial in this case, which decided a profoundly consequential and closely watched civil-rights issue, requires the maximum public access guaranteed by these First Amendment values. And the trial video at issue, which indisputably represents a true and accurate recording of court proceedings that were themselves public, and on which the district court relied in adjudicating this case, is a quintessential record of the utmost public importance. *See, e.g.*, *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1181 ("The public has an interest in ascertaining what evidence and records the District Court . . . relied upon in reaching [its] decisions."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999). The First Amendment requires that the public be granted access to that recording.

A. Proponents Have Asserted No Compelling Interest In Maintaining The Trial Video Under Seal

Proponents can overcome the First Amendment presumption of public access to judicial records only by a showing of "*compelling* reasons supported by *specific* factual findings." *Foltz*, 331 F.3d at 1135 (emphasis added); *accord Globe Newspaper Co.*, 457 U.S. at 606-07. Here, the only interest Proponents have asserted is protection of their expert witnesses from harassment and intimidation. As explained above, Proponents have not submitted *any* evidence to substantiate such

a purported fear, let alone provided a sufficient evidentiary basis for a court to make "specific factual findings" of harassment and intimidation. *See* ER 92-93 (concluding that Proponents' claims of witness intimidation are baseless).

In the absence of any evidence that their witnesses will be confronted with physical harassment if the video recordings are released, Proponents are left to argue that unsealing the tapes would subject their witnesses to verbal criticism and public rebukes. But, protecting witnesses providing voluntary, compensated testimony from public criticism—especially in a highly visible and controversial case like this one—is not a compelling interest. In fact, the Supreme Court has emphasized that robust public debate is paramount to harms far more concrete than those Proponents claim: "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1220 (2011); *see also id.* (First Amendment right to protest outside a funeral carrying signs such as "God Hates Fags" and "You're Going to Hell").

These principles have particular salience in this case. Proponents utilized California's initiative and referendum procedures to amend the California constitution, and subsequently intervened in this judicial action to convince the court to uphold the constitutionality of that measure. Their expert witnesses supported

Proponents' efforts through trial testimony in open court. All of these actions directly—and detrimentally—affected hundreds of thousands of California citizens. Thus, neither Proponents nor their witnesses have a right to be "hidden from public scrutiny and protected from the accountability of criticism." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring in the judgment). As Justice Scalia recently explained, "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.*

B. Continued Sealing Of The Entire Trial Recording Is Not Narrowly Tailored To Any Compelling Interest

Even if Proponents had proven they have a compelling interest in protecting their own two expert witnesses, they could not possibly explain how maintaining the recording of the *entire* trial under seal is "narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 607. Proponents do not even attempt to demonstrate that the supposed, unsubstantiated fears of their two expert witnesses (never presented to the district court directly by the witnesses themselves) justify sealing the testimony of Plaintiffs, Plaintiffs' experts or other fact witnesses, or the arguments of counsel. Further, Proponents' attempt to hide the trial recording from public view is especially pernicious in light of Proponents' very public accu-

sations that the trial was conducted unfairly by a biased judge. *See* ER 1155. No justifiable interests are served by allowing Proponents to undermine the integrity of the proceedings by simultaneously crying foul and suppressing the truth.

In fact, far from being narrowly tailored, Proponents' attempt to maintain a blanket seal on the trial recording is not even rationally related to their purported interest in preventing intimidation and harassment of their expert witnesses. In light of the extensive, publicly available information about Proponents' expert witnesses—their identities, their home and work addresses, their professional and academic affiliations, their views on same-sex marriage, their word-for-word testimony in this trial—keeping any portion of the video under seal does not serve Proponents' purported interest at all.

III. NOTHING IN THE SUPREME COURT'S *HOLLINGSWORTH* DECISION PREVENTS UNSEALING THE TRIAL VIDEO

Proponents have also argued that the Supreme Court's "narrow" decision in *Hollingsworth*, 130 S. Ct. at 709, now controls whether the common law or First Amendment affords the public the right to access the digital recording in this case. The district court correctly rejected this argument because the Supreme Court's decision "solely address[ed] procedural issues" stemming from the amendment of local rules, ER 9, and thus had no bearing on the public's right of access to the video recording.

As the district court noted, the *Hollingsworth* decision was explicitly "confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with federal law." *Hollingsworth*, 130 S. Ct. at 709. The Court did not "express any views on the propriety of broadcasting court proceedings generally." *Id*. Further, the decision, which was issued in response to Proponents' stay application, *only* addressed "the live streaming of court proceedings to other federal courthouses." *Id*. It explicitly did not "address other aspects of [the district court's] order, such as those related to the broadcast of court proceedings on the Internet." *Id*. And the *Hollingsworth* decision certainly took no position on the circumstances in which a properly made recording of trial proceedings that was placed in the judicial record without objection should be unsealed pursuant to common law and First Amendment principles of public access. Thus, as the district court correctly concluded, Proponents' "reliance on the Supreme Court's decision is misguided." ER 9.

IV. LOCAL RULE 77-3 DOES NOT SUPERSEDE THE COMMON LAW OR FIRST AMENDMENT RIGHT OF ACCESS.

Proponents' reliance on Local Rule 77-3 is equally unavailing. That rule prohibits, except under certain specified circumstances, "the taking of photographs, public broadcasting or televising, or recording *for those purposes* in the courtroom or its environs, in connection with any judicial proceeding." Civil L.R. 77-3 (em-

phasis added). Proponents argue that unsealing a digital recording of a trial proceeding, regardless of the *purpose* for which the recording was made, violates Rule 77-3 because unsealing would inevitably lead to public broadcast (presumably by third parties). The district court properly rejected this distorted reading of Local Rule 77-3.

As the district court correctly held, "Local Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes and uses." ER 10. Specifically, it prohibits recording a judicial proceeding for the purpose of public broadcast. But that is not what happened here. The district court expressly informed the parties it was recording the trial proceedings for the purpose of use in chambers and not for purposes of public broadcast. ER 1139. In fact, the district court did use the digital recording in chambers when reaching its decision, expressly stated in its decision that it had considered the digital recording, and made the digital recording part of the judicial record without objection. Because the digital recording was created for use in chambers as permitted by Local Rule 77-3 and not for the purposes of broadcasting or televising, its creation was in full compliance with the local rules.

The question that the district court confronted on Plaintiffs' motion to unseal has nothing to do with Local Rule 77-3, but rather asks whether a digital recording

of the trial proceedings, properly made for use in chambers and entered into the judicial record without objection by any party, should remain under seal. Local Rule 77-3 neither informs nor limits what may be entered into the judicial record. And plainly, the district court's local rule does not supersede the common law or First Amendment right of access to court records. ER 10.

CONCLUSION

This Court should affirm the district court's decision granting Plaintiffs-Appellees' motion to unseal the trial recordings.

Dated: November 14, 2011

/s/ Theodore J. Boutrous, Jr.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellees certify that there are three related appeals pending in the Ninth Circuit, *Perry, et al. v. Brown, et al*., No. 10-16696; *Perry, et al. v. Brown, et al*., No. 11-16577; and *Perry, et al. v. Brown, et al*., No. 10-16751, which arise out of the same district court case as the present appeal.

/s/ Theodore J. Boutrous, Jr.

Dated: November 14, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellees' Response Brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,008 words of text (not counting the cover, Tables of Contents and Authorities, this Certificate of Compliance, the Statement of Related Cases, or the Proof of Service) according to the word count feature of Microsoft Word used to generate this Brief.

/s/ Theodore J. Boutrous, Jr.

Dated: November 14, 2011

9th Circuit Case Number(s) 11-17255

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